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No. 08- 134

In the Supreme Court of the United States

NOEL CORNELIO, et al.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and PHOENIX PROCESSOR LIMITED PARTNERSHIP,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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In many respects the workers and the company are in agreement. Both sides agree that the workers are "seamen" for purposes of maritime law; that maritime law and labor law are implicated in this case; that the applicable statutes conflict in this setting; and that in the face of conflicting statutes, the role of the Court is to give "due consideration to the intent of Congress and accommodate the respective interests to be served." Resp.Br. at 18.

The parties disagree on how that accommodation of respective interests should be accomplished. The company argues for a mechanical process which effectively eliminates consideration of the labor interests in any maritime setting. The workers argue for a thoughtful, analytical process in which the Court does what courts do best: apply the applicable legal principles to the specific factual setting presented. In *Southern Steamship Co. v. National Labor Relations Board*, 316 U.S. 31 (1942), the balancing of the respective interests tipped in favor of the maritime law interests; here, labor law interests should prevail.

The workers request certiorari in order for this Court to reaffirm that in any particular case, maritime law and labor law will both still apply. To what extent one must trump the other depends on the particular facts of the case.

A. Stare decisis does not require the same result in a factually dissimilar case

The company argues that this case presents no factual basis for distinguishing *Southern Steamship*

and therefore stare decisis requires this Court to deny the Petition. Resp.Br. at 9-10. However, when the facts of a case are dissimilar, a court must decide "whether those differences . . . allow the precedent to be distinguished on a principled basis:"

> Using the techniques developed at common law, a court confronted with apparently controlling authority must parse the precedent in light of the facts presented and the rule announced. Insofar as there may be factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis.

Hart v. Massanari, 266 F.3d 1155, 1172 (9th Cir. 2001).

Far from asking this Court to ignore stare decisis, the workers are actually requesting this Court to reaffirm its position in *Southern Steamship* that, when confronted with two conflicting federal statutes, a court must conduct a thorough review of the respective interests fostered by those statutes in the context of the facts presented by the case. The factual setting of this case is far different from that in *Southern Steamship*, and analysis of the respective interests of the conflicting statutes should result in a different conclusion.

B. Petitioners are not asking this Court to redefine "seaman" under maritime law

There is no dispute that the workers are "seamen" for maritime law purposes under the test articulated by this Court in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995). However, contrary to the company's position, there is no mechanical process by which the Court simply plugs the word "seaman" into a case involving both maritime and labor law issues and out comes the answer "no NLRA protection." Rather, as explained by the Court in *Southern Steamship*, 316 U.S. at 47, and by the company, Resp.Br. at 18, the correct methodology when confronted with two conflicting federal statutory schemes is to look at the respective interests to be served – in this case vessel safety versus worker rights.

The company imagines a parade of horribles if factory workers were allowed to disobey a master. Resp.Br. at 8. In the case of a shipboard emergency – for example, if the ship were engulfed in flames and all hands were needed to help fight the fire – obviously the maritime interests would outweigh labor interests. In an emergency all seamen, including those with no role in navigation or handling of the vessel, must obey the commands of the master. This would be true for everyone on board the vessel – even passengers must obey the master in an emergency. R. Force & M. Norris, 2 *The Law of Seamen* § 25:14, p. 25-16 (5th ed. 2003). But while a passenger must obey a captain's order to grab a hose and help fight a fire in an emergency, he is not

required to obey a master's order to go below and cut fish for 16-1/2 hours a day.

The master's authority is not boundless – the master may not issue unlawful orders, and seamen need not obey unlawful orders. *The Mary Ann*, 16 F.Cas. 949, 951 (S.D. N.Y. 1848). Suppose, in an extreme example, a master were to command a seaman to shoot a fellow seaman who the master thought was not working hard enough. That would be an unlawful order that the seaman could rightfully refuse to obey.[1] Thus, it may be permissible under maritime law to punish a factory worker for refusing to obey a lawful order to work long hours when necessary to fight a fire to save the ship; but it is not permissible under labor law to punish a factory worker for participating in a collective work stoppage to protest an unreasonable increase in working hours when the added hours are not to save the ship but merely to increase the company's profits.

Respondent's implicit argument that a court is unable to balance the competing interests of two statutory schemes when presented with a factual dispute is an affront to the judicial system. The idea that one of those interests – maritime law – must always trump labor law because a court cannot be trusted to apply anything but a mechanical analysis is ludicrous. In advocating that position, the company is actually doing what it (wrongly) accuses the workers of doing; that is, ignoring explicit

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[1] Even in a military context an unlawful order need not be obeyed. *See* 10 U.S.C. § 892; *U.S. Navy-Marine Corps. Court of Military Review v. Carlucii*, 26 M.J. 328, 335 (CMA 1988).

Congressional intent. Congress' intent to protect workers by affording them the right to bargain collectively over working conditions is no less explicit than Congress' intent to require seamen to obey a ship's master.

C. Critical distinctions exist between Petitioners and *Southern Steamship*'s seamen

In *Southern Steamship*, after reciting the facts the Court noted: "[i]t is in this setting of fact and law that we must test the validity of the Board's order of reinstatement." 316 U.S. at 39. The factual setting in this case is vastly different from that in *Southern Steamship*, and the balance of the conflicting Congressional interests tips in favor of the labor law protection of these workers.

1. These Petitioners were not governed by Shipping Articles.

The company includes excerpts from the factory workers' employment contracts and employee "Informational Booklet" and concludes that these governing documents are indistinguishable from traditional Shipping Articles in that they both require obedience to the master. But the employment documents in this case established a relationship between worker and master that was very different from that under the Shipping Articles governing the seamen in *Southern Steamship*.

It is undisputed that the workers were at-will employees under their employment contracts. Unlike Shipping Articles, the employment contracts

here gave both the employer and employee the right to terminate the employment at will. By freely giving factory workers the right to stop work, the company lost the right to lawfully command them to return to work in the factory.

In contrast, the Shipping Articles in *Southern Steamship* required obedience to the master's orders at all times. In that case this Court stressed the importance of the Shipping Articles signed by the seamen:

> But it is worth noting here that the form of the 'shipping articles' which the master and every member of the crew must sign prior to the voyage has been carefully prescribed by Congress, and that these articles contain this promise: 'And the said crew agree * * * to be obedient to the lawful commands of the said master * * * and of their superior officers in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, or on shore * * *.' U.S.C., Title 46, ss 564, 713, 46 U.S.C.A. ss 564, 713.

Southern Steamship, 316 U.S. at 38-39 (emphasis added). Those articles were also important when the time came for the shipowner and the deputy United States Shipping Commissioner to order the crew back to work. *Southern Steamship*, 316 U.S. at 35. There was no doubt in anyone's mind that the crew were being ordered back to work based on their duty to obey pursuant to the Shipping Articles.

Here, after the workers walked off the job, the master was without contractual authority to order the workers back to work because (a) he did not have the authority under at-will contracts that he would have had from the Shipping Articles; and (b) there was no emergency imperiling the safety of the vessel.[2]

2. These workers were not protected by federal statutes that protect other seamen's working conditions.

In *Southern Steamship*, this Court made a point of explaining that the burden imposed by the absolute obedience required under the Shipping Articles was offset by the fact that the traditional seamen involved there benefited from the "extraordinary legislative solicitude" provided to such seamen:

> The statutes of the United States contain elaborate requirements with respect to such matters as their medicines, clothing, heat, hours and watches, wages, and return transportation to this country if destitute abroad. U.S.C., Title 46, ss 651-692, 1131, 46 U.S.C.A. ss 651-692, 1131.

316 U.S. at 39 (emphasis added).

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[2] The language in the Employee Informational Booklet quoted in Resp. Br. at 9 applied only "in the event of an emergency."

In contrast, the workers here were not protected by such statutes. If they had been, this case would not have arisen, because the company would not have been allowed to force the factory workers to work 16-1/2 hour days. The ship's navigational crew (*e.g.*, the sailors who operate the boilers, the wheelhouse and the deck) do not work the same brutal schedule as the factory workers. Their need for adequate rest is Congressionally protected by 46 U.S.C. § 8104. In contrast, the factory workers have no other means, besides their bargaining rights under the NLRA, to protect them from abusive labor practices.

3. The master's "order" in this case was murky at best.

The master's "order" in this case was vague, and a far cry from the explicit orders in *Southern Steamship*. The Hearing Judge found that Captain Smith did not order the workers back to work; he merely "encouraged" them:

> Captain Smith spoke to employees in the library and encouraged them to return to work. . . . When employees did not return to work, Captain Smith considered they had quit and told them so.

Pet.App. at B-42. The ship's factory manager also gave no such order; he merely gave the workers an opportunity to return to work "without penalty."

Pet.App. at B-44.[3]

The Board's two-member majority, however, reversed the Hearing Judge's finding that no actual order was given, based on statements by the captain and factory manager that, if they wanted to keep their jobs, the workers had to return to work. Pet.App. at B-12. In support of its reversal, the majority offered this testimony from Captain Smith: "I mean, from the very beginning, it was, go back to work and I phrased it every possible way you could phrase it, to get them to go back to work." *Id.* In fact, he used "every possible way" except an order; but nevertheless the Board concluded that whatever he said was close enough:

> Thus, regardless of whether they used the word "order," [Captain] Smith and [factory manager] Hermens made clear that in order to remain employed, the processors had to return to work.

Id. If an entire statutory scheme (NLRA) is going to be cast aside on the principle that a master's order must be obeyed, it is only reasonable to expect that an explicit order must be given. "Close" is not good enough.

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[3] The dissenting member of the Board described in detail the evidence as to whether the workers were actually "ordered" back to work. *See* Pet.App. at B-23-24 (Liebman, dissenting).

4. Petitioners' actions did not endanger the ship, and an imposed (non-negotiated) 16-1/2 hour work-day was unreasonable.

Even if the request by Captain Smith constituted an "order," when analyzing the respective interests reflected in the conflicting federal statutes involved here – a seaman's duty of obedience to the master versus a worker's right to bargain collectively, that analysis must tip in favor of the factory worker's rights in this case.

In *Southern Steamship*, the seamen's unlawful and mutinous acts (violating the implicit promise in the Shipping Articles not to strike, wresting control of the vessel from the master and endangering the ship) led to this Court's conclusion, issued in the first year of the United States' formal involvement in World War II, that in that particular "setting of fact and law" the maritime interests trumped the labor interests. 316 U.S. at 47. (Even in that setting it was a close case, decided by a 5-4 vote.) In contrast, the workers here did not mutiny, did not wrest control of the ship away from the master, and did not endanger the vessel. The master voluntarily chose to divert the vessel to Dutch Harbor in order to discharge the workers; they never demanded to be taken ashore.

On the labor law side of the balance is the following setting: the workers were not protected by statutory working hour limitations afforded other seamen; their work involved dangerous working conditions (sharp knives, moving machinery, slippery floors); and the workers did not agree to a 16-1/2

hour day before the ship set sail. When the respective interests of the two Congressional directives are properly considered and balanced, only one conclusion can be reached here: that in the factual setting of this case, Congress' intent to protect worker rights outweighs the duty of obedience otherwise owed by seamen to a master.

D. Legislative inactivity provides no help in determining how this case should have been decided

The company argues that Congress' failure to amend maritime statutes to provide an exception for seamen who are not involved in the navigation or propulsion of the vessel constitutes acceptance of the principle that maritime law must always trump labor law. But that argument can just as easily be turned around to support the workers' position. Thus, it could just as easily be argued that since Congress has never, in the 73 years since the passage of the NLRA, created an exception to that Act for seamen, Congress must have intended that there be no such "seaman" exception under the NLRA. Because the "Congressional inactivity" argument can just as easily support opposite conclusions in this case, it provides no help in reaching a proper decision.

There are many reasons why Congress may choose not to act:

> The complicated check on legislation, erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that

> congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.

Johnson v. Transp. Agency, Santa Clara County, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (citation omitted).

Whatever the reason for Congress' failure to modify either the maritime statutes or the NLRA, the company has certainly not presented the "overwhelming evidence of acquiescence" to *Southern Steamship* necessary to draw any conclusions from such omission. *Rapanos v. United States*, 547 U.S. 715, 750 (2006).

E. It is Respondent, not Petitioners, who is asking the Court to impermissibly legislate

The company contends that there is a "clear and recognized exception to workers' NLRA right to engage in concerted activities" for seamen. Resp.Br. at 19. Certainly no such exception is expressed in the language of the statute. Only under a mechanical interpretation of this Court's conclusion in *Southern Steamship* could such an exception spring into existence. Applying the Court's actual reasoning in *Southern Steamship*, involving consideration of the respective purposes intended to be served by the conflicting statutory schemes, compels a decision in favor of protecting the workers'

rights under labor law in the factual setting of this case. By asking this Court to approve the Ninth Circuit's simplistic conclusion that under *Southern Steamship* the maritime purpose (obedience to a ship's master) always trumps the labor purpose (protecting workers' rights), the company is the party requesting improper judicial legislation.

The workers are simply asking this Court to restate the basic principle that all applicable statutes must be considered in light of the particular facts presented and, when faced with conflicting statutes, a court must perform the requisite balancing of the respective interests in order to give the maximum effect to the intent of the legislature expressed in both statutes.

For the reasons set forth above and in the petition, certiorari should be granted.

Respectfully submitted this 13th day of October, 2008.

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